

RD AN No. 4123 (1942-A)
November 10, 2005

TO: State Directors
Rural Development

ATTN: Community Program Directors, All Community Facilities
Staff, State Architects and Engineers

FROM: Russell T. Davis (*Signed by Russell T. Davis*)
Administrator
Rural Housing Service

SUBJECT: Design/Build and Construction Management Proposals

PURPOSE/INTENDED OUTCOME:

The purpose of this Administrative Notice (AN) is to provide guidance to Rural Development staff and to streamline the process of requesting and obtaining National Office concurrence in the use of design/build or construction management proposals. This AN clarifies the requirements in RD Instruction 1942-A, sections 1942.9 and 1942.18(l).

COMPARISON WITH PREVIOUS AN:

Previous AN No. 3986 on this subject expired May 31, 2005. This AN reissues guidance and implementation procedure for these projects.

BACKGROUND:

Section 1942.18(l) states "Procurement methods which combine or rearrange design, inspection or construction services (such as design/build or construction management) may be used with Rural Development written approval. If the contract amount exceeds \$100,000, National Office prior concurrence must be obtained under section 1942.9(b) of this subpart." The number of requests for approval of the use of design/build and construction management proposals in Community Programs has increased significantly in recent years.

EXPIRATION DATE:
November 30, 2006

FILING INSTRUCTIONS:
Preceding RD Instruction 1942-A

With the increase in the number of proposals submitted to the National Office for concurrence, the time required to complete the concurrence process increased as well. In order to expedite the process for design/build or construction management contracts exceeding \$100,000, the procedure outlined in this AN will be used. The State Office will continue to approve contracts less than \$100,000.

The Design/Build (DB) method of construction is one in which architectural and engineering services normally provided by an independent consultant to the owner are combined with those of the general contractor under a single source contract. These services are commonly provided by a DB firm, a joint venture between an architectural firm and a construction firm, or a company providing pre-engineered buildings and design services.

Over the years, two types of Construction Management have evolved: Construction Manager as Constructor (CMc) and Construction Manager as Advisor (CMA). The CMc acts in the capacity of a General Contractor and is actually responsible for the construction. This type of Construction Management is also referred to as Construction Manager "At Risk". The construction contract is between the owner and CMc. The CMc in turn subcontracts for some or all of the work. The Agency's experiences with CMc contracts have been primarily positive. We perceive that our borrower's are typically receiving a reasonable level of service for the proposed fees under these contracts.

A CMA acts in an advisory capacity to the owner. The actual contract for construction is between the owner and a prime contractor or multiple prime contractors. The Agency's experiences with CMA contracts have not typically been as positive. Please ensure that the fee structure, including reimbursables, is reasonable when considering the level of services to be provided. It is also important to review both the architect's agreement and the CMA contract to ensure that services are not being duplicated. When the borrower proposes an architect's agreement and a separate contract for Construction Management Advisor services, Section 1942.18(k)(4) notes, under "Noncompetitive Negotiation", that hiring an architectural firm without competition is acceptable. The activities performed by an architectural firm are design related activities. The construction management services provided under a CMA contract are related to the construction of the project.

Since the construction related services cannot be procured through noncompetitive negotiation, the procurement of CMA services must meet the maximum open and free competition requirements. Section 1942.18(j)(7) "Unacceptable bidders", states: "The following will not be allowed to bid on, or negotiate for, a contract or subcontract related to the construction of the project: (i) An engineer or architect as an individual or firm who has prepared plans and specifications or who will be responsible for monitoring the construction." The borrower's architect and sister corporations cannot bid on the CMA contract.

All projects over \$100,000 using Construction Management, whether CMc or CMA, must be submitted to the National Office for review using the procedure outlined in this AN.

All Design/Build or Construction Management projects must comply with the requirements for “maximum open and free competition” in Section 1942.18(j)(2). Further information on procurement methods which must be followed is provided in Section 1942.18(k).

IMPLEMENTATION:

RD Instruction 1942-A requires prior concurrence by the National Office before a design/build or construction management proposal over \$100,000 may be approved by the Agency. Information, as outlined in Section 1942.18(l), must be reviewed by the Agency as part of the concurrence process.

To expedite the National Office concurrence process under Section 1942.9, the attached checklist will be completed by the State Architect or Engineer in his/her review of the proposal to use design/build or construction management. The State Architect or Engineer will initial each item listed on the checklist indicating that he/she has reviewed that item, and sign the checklist. Likewise, the State Director or his designee will sign the form. A copy of the checklist will be submitted to the National Office, Program Support Staff (PSS), along with a cover memorandum and the required supporting documentation listed in RD Section 1942.9. The memorandum should include a return fax number.

Information may be: (1) mailed to USDA/RHS/PSS, Room 6900, Mail Stop 0761, 1400 Independence Ave. SW, Washington, DC, 20250-0761; (2) faxed to 202-690-4335; or (3) e-mailed to larry.fleming@wdc.usda.gov and copied to chad.parker@wdc.usda.gov. All information related to a request should be submitted via the same method. If information is e-mailed, initials and signatures on the checklist may be typed, with a signed copy maintained in the official Agency file.

National Office program and PSS staff will review the memorandum, documentation, and checklist provided, including any comments entered by the State Architect or Engineer. Any questions or concerns regarding the material reviewed or submitted should be included in the “Comments” section of the checklist. The checklist, if acceptable, will be concurred in by the Director, Community Programs Direct Loan and Grant Division. A concurrence statement will be sent by fax or e-mail to the State Office prior to mailing back the signed documents.

Please direct all questions pertaining to this AN to Chad Parker, Director, Direct Loan and Grant Division at (202) 720-1502 or Larry Fleming, Architect, Program Support Staff at (202) 720-8547.

Attachment

**COMMUNITY FACILITIES
DESIGN/BUILD OR CONSTRUCTION MANAGEMENT
CONCURRENCE CHECKLIST**

(Comments may be attached or entered on this form. Items in italics are explanatory in nature.)

Section 1942.9(b) requires the following items be submitted to the National Office:

1. State Director's and Agency Architect / Engineer's comments and recommendations. (When noncompetitive negotiation is proposed, submit an evaluation of previous work of the proposed construction firm.)
2. Regional attorney's opinion and comments regarding the legal adequacy of the proposed procurement method and proposed contract documents. *(If this review is being requested concurrently to expedite the process, please so indicate.)*
3. A copy of the owner's written request and description of the procurement method proposed. *(This may be the same "written request" listed as #1 below.)*
4. A copy of the proposed contract. *(If standard industry contract forms, such as AIA, DBIA or AGC are used, submittal of entire contract is not required. Indicate type of contract, publisher, and what, if any, additions, deletions, changes, or addenda have been made.)*

Section 1942.18(l) requires the owner to provide the following information to the Agency. State Architect / Engineer will initial each item reviewed:

- _____ 1. The owner's written request to use an unconventional contracting method with a description of the proposed method.
- _____ 2. A proposed scope of work describing in clear, concise terms the technical requirements for the contract. It should include such items as:
 - _____ a) A non-technical statement summarizing the work to be performed by the contractor and the results expected.
 - _____ b) The sequence in which the work is to be performed and a proposed construction schedule.
- _____ 3. A proposed firm-fixed-price contract for the entire project which provides that the contractor shall be responsible for:
 - _____ a) Any extra cost that may result from errors or omissions in the services provided under the contract.
 - _____ b) Compliance with all Federal, State, and local requirements effective on the contract execution date.
- _____ 4. Where noncompetitive negotiation is proposed, an evaluation of the contractor's performance on previous similar projects in which the contractor acted in a similar capacity.
- _____ 5. A detailed listing and cost estimate of equipment and supplies not included in the construction contract but which are necessary to properly operate the facility.
- _____ 6. Evidence that a qualified construction inspector who is independent of the contractor has or will be hired.
- _____ 7. Preliminary plans and outline specifications.
- _____ 8. The owner's attorney's opinion and comments regarding the legal adequacy of the proposed contract documents and evidence that the owner has the legal authority to enter into and fulfill the contract.

COMMENTS: _____

The State Office has reviewed the above materials and makes a recommendation for concurrence of the use of the **design / build** or **construction management** method (circle one or the other) of development for this proposal.

State Director (or designee) Date: _____

NATIONAL OFFICE REVIEW

This proposal was reviewed by PSS, and we recommend concurrence:

Reviewer Date: _____ Director, Program Support Staff
Date: _____

The proposal to use the design / build or construction management method is concurred in by:

Director, CP Direct Loan and Grant Division
Date: _____

CP / PSS Comments on Submittal: _____

